

## BOOK NOTE\*

THE MORAL CRITICISM OF LAW. BY DAVID A.J. RICHARDS.  
Dickenson Publishing Co., 1977. Pp. ix, 278. Price \$6.95  
paperbound.\*\*

Professor Richards' theory of constitutional adjudication may be put in bold relief by juxtaposing it to the famous remarks of Mr. Justice Holmes in *Lochner v. New York*.<sup>1</sup> Confronted with the Court's invalidation of legislation establishing maximum working hours in bakeries, Holmes complained: "[t]his case is decided upon an economic theory which a large part of the country does not entertain. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."<sup>2</sup> No doubt this is true, Richards would reply, but the Constitution does enact social contract theory, and this justifies interpreting it in terms of that theory and its contemporary refinements by John Rawls and himself. "Contractarian theory does not beckon as a theoretical desideratum extraneous to the constitutional order; it is at its foundation. The choice of this moral theory is not an open question in the United States; it is the theory of the Constitution and, as such, requires the most serious analysis."<sup>3</sup>

That Richards should be championing contractarian theory is, of course, no surprise. His previous work has been explicit and sophisticated in its defense of a Rawlsian approach to moral theory generally and to legal analysis specifically.<sup>4</sup> Indeed, a significant portion of this new book is a consolidation of his articles in "the context of a larger theoretical framework."<sup>5</sup> What may come as a certain surprise is the format in which this contribution to constitu-

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<sup>1</sup> 198 U.S. 45 (1905).

<sup>2</sup> *Id.* 75 (Holmes, J., dissenting).

<sup>3</sup> D.A.J. RICHARDS, *THE MORAL CRITICISM OF LAW* 51 (1977) (footnote omitted).

<sup>4</sup> See D.A.J. RICHARDS, *A THEORY OF REASONS FOR ACTIONS* (1971); Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 *FORDHAM L. REV.* 1281 (1977); Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 *U. PA. L. REV.* 45 (1974); Richards, *Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication*, 41 *U. CHI. L. REV.* 32 (1973).

<sup>5</sup> D.A.J. RICHARDS, *supra* note 3, at vii.

tional theory comes. The book is intended as an introduction to the philosophy of law, and for use in conjunction with a well-known anthology in the field.<sup>6</sup> Whatever its avowed purpose, however, it deserves the attention of any who feel the need for a coherent set of principles of constitutional adjudication in American law.

At the outset, it may be helpful to describe briefly the structure of the book. Following a review of the traditional jurisprudence of the concept of law and the relationship between law and morality, Richards adopts the legal positivism of H.L.A. Hart and gives a brief but effective defense of Hart's position against such would-be critics as Lon Fuller and Ronald Dworkin.<sup>7</sup> He then sets out the theoretical framework with which he will attack specific legal problems. First, he adopts what he calls "methodological natural law theory."<sup>8</sup> I shall return to this theory shortly, for it is the crucial move in the book.<sup>9</sup> On the basis of this methodology, Richards reviews recent American constitutional theory<sup>10</sup> and concludes, with Dworkin, that it fails to recognize the importance of a notion of moral rights in any adequate theory of constitutional adjudication.<sup>11</sup> In order to fill this gap, he proceeds to elaborate a contractarian theory of rights by setting up the Rawlsian "original position" and deriving two basic principles of justice.<sup>12</sup> Space does not permit discussion of this controversial feature of Rawls' social contract theory; it must suffice to state the principles that Richards believes would be reached through its use. Their similarity to Rawls' principles will be apparent to anyone familiar with his work:<sup>13</sup>

*The principle of equal liberty and basic opportunity*

Basic institutions are to be arranged so that every person in the institution is guaranteed the greatest equal liberty and basic opportunity compatible with a like liberty and basic opportunity for all.

<sup>6</sup> *Id.* vi.

<sup>7</sup> *Id.* 23-31.

<sup>8</sup> *Id.* 31-33.

<sup>9</sup> See text accompanying notes 35-40 *infra*.

<sup>10</sup> This review of constitutional theory is extremely cursory. A more recent and thorough discussion of modern theories may be found in Richards, *Rules, Policies, and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication*, 11 GA. L. REV. 1069 (1977).

<sup>11</sup> D.A.J. RICHARDS, *supra* note 3, at 40-44.

<sup>12</sup> The Rawlsian device asks us to imagine hypothetical rational contractors, ignorant of their special circumstances but knowledgeable about their general circumstances, choosing principles of justice for social institutions.

<sup>13</sup> See J. RAWLS, A THEORY OF JUSTICE 60, 302-03 (1971).

*The principle of justified inequality*

Inequalities in the distribution by institutions of general goods like money, property, and status are to be allowed only if those inequalities are a necessary incentive to elicit the exercise of superior capacities and only if the exercise of those capacities advances the interests of typical people in all standard classes in the institution more than equality would advance those interests and makes the life expectation of desire satisfaction of the typical person in the least-advantaged class as high as possible.<sup>14</sup>

Having derived these principles, Richards then brings them to bear on a variety of constitutional problems and Supreme Court decisions. First he urges that his principle of equal liberty requires the protection of obscene communications under the first amendment.<sup>15</sup> He then derives a third principle from the original position, that of "love as a civil liberty,"<sup>16</sup> which he uses to justify the recent promulgation of a constitutional right to privacy and to recommend an analogous recognition of the equal rights of homosexuals.<sup>17</sup> Following discussion of these Bill of Rights questions, Richards plunges into the equal protection thicket. He argues that equal educational opportunity follows from his first principle and that, accordingly, the school financing schemes upheld by the Supreme Court in *San Antonio Independent School District v. Rodriguez*<sup>18</sup> should have been subjected to strict scrutiny and invalidated.<sup>19</sup> He reaches a similar result as to gender classifications,<sup>20</sup> but argues that preferential racial classifications designed to remedy past discrimination are not suspect.<sup>21</sup>

Turning from equal protection, Richards next applies his contractarian theory to problems of responsibility and punishment. He argues that the "principle of legality"<sup>22</sup> ("no crime or punishment except in accordance with fixed, reasonably specific, and fairly ascertainable preestablished law"), *mens rea*<sup>23</sup> (at least negligence), *actus*

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<sup>14</sup> D.A.J. RICHARDS, *supra* note 3, at 48-49.

<sup>15</sup> *Id.* 56-79.

<sup>16</sup> *Id.* 90. See text accompanying note 41 *infra*.

<sup>17</sup> *Id.* 91-109.

<sup>18</sup> 411 U.S. 1 (1973).

<sup>19</sup> D.A.J. RICHARDS, *supra* note 3, at 138-61.

<sup>20</sup> *Id.* 162-67, 173-78.

<sup>21</sup> *Id.* 170-72.

<sup>22</sup> *Id.* 195-99.

<sup>23</sup> *Id.* 206-09.

*reus*<sup>24</sup> (including attempts), and the insanity defense<sup>25</sup> should all be viewed as constitutional requirements flowing from his first principle. Laws providing for the commitment of the mentally ill should also be subject to strict scrutiny, and persons committed should be acknowledged to have a constitutional right to treatment.<sup>26</sup> He then briefly discusses the appropriateness of enforcing a duty of mutual aid through good samaritan laws.<sup>27</sup> Finally, Richards develops from his contractarian principles a "moral theory of punishment." Here he adds to the requirements derived under the rubric of responsibility several additional requirements for just punishment. Punishment "must reflect the moral gravity of offenses punished"<sup>28</sup> (proportionality); it must be of such a nature as to deter criminal behavior;<sup>29</sup> and "the upper level of penal sanctions is to be governed by one final principle of punishment, a principle of effectiveness and economy in sanctions."<sup>30</sup> Although the death penalty is neither condemned nor required by contractarian theory in the abstract, Richards concludes that, on the basis of present empirical evidence, it fails to satisfy the principle of effectiveness and economy, and is consequently unconstitutional.<sup>31</sup>

All of this is an impressive philosophical *tour de force*. The synopsis presented above cannot hope to capture either the seriousness or the subtlety of Richards' arguments on any of these topics; each deserves more careful evaluation than can be set forth here. A few general observations, however, are in order. First, it should not be inferred that Richards claims any particular originality for many of his distinctions and insights. He copiously documents his sources in a way that demonstrates the richness and diversity of the literature from which he draws. What is original is the particular manner in which he integrates law and philosophy. Second, the book's discussions are uneven, both in the breadth of the problems discussed and in the thoroughness with which each problem is treated. They range, for example, from the fairly specific problem of school financing to the very general problem of just principles of punishment, and while some twenty-three pages are devoted to the

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<sup>24</sup> *Id.* 201-02.

<sup>25</sup> *Id.* 214-16.

<sup>26</sup> *Id.* 216-20.

<sup>27</sup> *Id.* 221-24.

<sup>28</sup> *Id.* 243.

<sup>29</sup> *Id.* 244.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* 254-59.

discussion of school financing<sup>32</sup> only six are devoted to the problem of preferential treatment.<sup>33</sup> Third, despite the wide range of problems covered in the book, a conspicuous omission is evident when one returns to Richards' two basic principles of justice. The second principle, it will be recalled, is one of justifiable inequalities. Yet with one minor exception in the discussion of punishment, all of Richards' analyses derive from the first principle. This is hardly surprising, as it is certainly philosophically easier to demonstrate why certain traditionally victimized groups should be treated with equal respect than it is to show which inequalities may justly remain. But surely Richards does not intend to imply that the principle of equal liberty will solve all problems of constitutional adjudication. For example, notoriously difficult problems concerning the appropriate treatment of property under the fifth, fourteenth, and sixteenth amendments must presumably be governed by the principle of justifiable inequality. Yet no consideration of these problems appears in a book purporting to be a general introduction to the moral criticism of American constitutional law. The omission, although not surprising, is regrettable. It creates the impression that these problems are secondary and that all of the hardest problems have been at least confronted, if not definitively resolved. More seriously, we are left with little indication as to how Richards believes contractarian theory should proceed in applying the second principle to constitutional adjudications involving the distribution of wealth.<sup>34</sup>

All that aside, perhaps the most interesting and puzzling feature of the book is the methodology Richards adopts. As discussed earlier, he embraces Hart's legal positivism, but then follows what he terms a natural law methodology:

Methodological natural law theory, as I practice it in this book, rests on this essentially empirical observation that legal and moral concepts significantly interconnect in concrete legal institutions of many kinds. Taking this empirical fact as a methodological postulate, this form of

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<sup>32</sup> *Id.* 138-61.

<sup>33</sup> *Id.* 170-72, 176-78. The author does, however, refer the reader to what is presumably a more complete discussion of this topic by the author in a forthcoming anthology. See *id.* 190 n.167.

<sup>34</sup> Richards does say that the judiciary is particularly competent to apply the principle of equal liberty, "whereas the application of the principle of justified inequality involves complex assessments of social and economic facts and theories which should in general be left to legislatures." *Id.* 55. Unless he intends that the legislature is to exercise *carte blanche* when property rights are at issue, this is at best a suggestive beginning.

natural law theory focuses on the examination of those concrete legal institutions and issues that rest on moral conceptions.<sup>35</sup>

This, of course, is not especially novel. One would suppose that a positivist such as H.L.A. Hart would accept this as a characterization of what he was doing in his book *Law, Liberty, and Morality*.<sup>36</sup> What is novel is the departure that Richards believes he is making from the approach that a positivist would take:

[M]ethodological natural law theory may be distinguished from the traditional sharp legal positivist distinction between the popular conventional morality underlying many laws and the enlightened (often utilitarian) morality in terms of which laws were to be criticized and reformed. Methodological natural law draws no such sharp distinction. Rather . . . the moral analysis, which often clarifies the form of legal doctrine, is the same analysis which is the basis of moral criticism.<sup>37</sup>

When it is realized that Richards adopts this methodology while agreeing with legal positivism that, as a logical matter, there is no necessary connection between law and morality, it should be clear what he is positing: in some legal systems, that which need not necessarily be true is nevertheless, for practical purposes, factually or empirically true. This is the case, he argues, with American constitutional law.

[T]o suppose some type of necessary relation between law and morals in American legal experience is not implausible. In America we have written state and federal constitutions that literally incorporate substantive moral criteria into the conditions of legal validity. For example, the Fourteenth Amendment to the Constitution speaks of "due process of law" and "equal protection of the laws."<sup>38</sup>

On the other hand, Richards' argument continues, there may not always be such an intimate connection between moral concepts and the law, and "where the task of moral criticism is facilitated by the traditional legal positivist approach (as it may be in England, for example), that approach should be preferred."<sup>39</sup>

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<sup>35</sup> *Id.* 33.

<sup>36</sup> H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963).

<sup>37</sup> D.A.J. RICHARDS, *supra* note 3, at 33 (footnotes omitted).

<sup>38</sup> *Id.* 39.

<sup>39</sup> *Id.* 35.

In order to justify abandoning the sharp positivist distinction between conventional and critical morality, however, Richards needs more than such general conceptions as "due process" and "equal protection." Presumably it must also be the case that one's critical moral standards generally coincide with those on which the legal structure is founded—that is, with the conventional moral standards that have been incorporated in the fundamental laws. This happy coincidence, which Richards finds in American constitutional law, accounts for the statement quoted at the beginning of this note to the effect that social contract theory is no longer an open question in American law. Elsewhere Richards states that he will "endeavor here to present and explain a contractarian moral theory, showing how this theory may explain the structural features of constitutional law which remain inexplicable under available theories, and then focusing this theory on concrete problems of constitutional adjudication."<sup>40</sup>

The most obvious thing to be said about such a methodology is that if social contract theory is not a satisfactory way to derive objective principles of justice, then Richards' theory of constitutional adjudication must also be unsatisfactory. His methodology depends upon the agreement between the theory underlying the Constitution and the critical moral theory of the commentator. But to the extent that one believes, as does this reviewer, that Rawls has shown contractarian theory to be at least a constructive starting point, Richards' methodology may be particularly helpful for students of American constitutional law.

At the same time, Richards' legal analyses seem problematic for at least two reasons, either as a necessary result of methodological natural law theory or as a function of its too hasty employment. First, Richards believes that under his methodology he can justify the "discovery" of rights in the Constitution which it scarcely seems plausible to argue are contained therein. Furthermore, the role that Richards accords the judicial branch in drawing out the constitutional implications of contractarian theory fails to take account of the complexity of the very Constitution for which the method is designed.

These problems are nowhere as obvious as in Richards' treatment of the right to privacy. He argues that rational contractors in the original position would adopt a "principle of love as a civil liberty": Basic institutions are to be arranged so that every person in the institution is guaranteed the greatest equal liberty, oppor-

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<sup>40</sup> *Id.* 44.

tunity, and capacity to love, compatible with a like liberty, opportunity, and capacity for all.<sup>41</sup> Such a principle, he believes, provides a moral justification for the privacy rights which were recognized in *Griswold v. Connecticut*<sup>42</sup> and *Roe v. Wade*,<sup>43</sup> as well as for constitutional protection of homosexual relationships between consenting adults.<sup>44</sup>

It is not my purpose here to disagree with Richards' moral analysis. Assuming that each of these forms of conduct deserves legal protection at the constitutional level, however, it does not necessarily follow that such protection is implicit in our Constitution; yet Richards argues as if it does. In effect, he accepts the reasoning of *Griswold*.

The very intellectual process of the Court in first enunciating the constitutional right of privacy illustrates the kind of reasoning called for by contractarian principles. Thus, Justice Douglas argues by analogy that various constitutional provisions preserve values similar to the constitutional right of privacy, and that accordingly that right may be established as an independent value. . . .

These analogies may be stated in even more compelling fashion. While the Bill of Rights is not directly involved in the constitutional right of privacy cases, its underlying values are implicit in the consideration of love as a primary good, so that constitutional values require that, in the light of modern knowledge, love be acknowledged as a constitutional right.<sup>45</sup>

With all due respect to Mr. Justice Douglas, it must be admitted that the similarity between the specific values protected by the first, third, fourth, fifth, and ninth amendments and the rights to use contraceptives and to have abortions is not immediately obvious. Those constitutional values are even more distant from the right to love argued for by Richards. The right to privacy was surely a radical extension of the constitutional language, and not implicit therein. Richards' argument that the Constitution will properly yield even more radical extensions of the right to privacy requires us to view the Constitution as a Rawlsian manifesto rather than as a limited positive legal document. At the very least, this approach

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<sup>41</sup> *Id.* 90. See text accompanying note 16 *supra*.

<sup>42</sup> 381 U.S. 479 (1965).

<sup>43</sup> 410 U.S. 113 (1973).

<sup>44</sup> D.A.J. RICHARDS, *supra* note 3, at 106.

<sup>45</sup> *Id.* 94 (footnote omitted).



makes nonsense of the procedure for amending the Constitution. One might suppose that Richards views that procedure as little more than a safeguard against myopic judges rather than as the primary mechanism for altering and enlarging the fundamental law.

This problem is addressed in the introductory part of the book, but the author's comments are unsatisfying. The reader is asked (following Dworkin) to distinguish between concepts and conceptions of justice,<sup>46</sup> the former being the ideal principles which would be adopted from the original position, the latter, particular historical ways of thinking about justice. We are then told that "[t]he argument thus can forcefully be made that the proper moral interpretation of the constitutional order would emphasize the concept of justice embodied in the Constitution as developed by subsequent amendments, not the historically limited conception of justice of the country's founders."<sup>47</sup> But the conceptions of subsequent amenders must also be historically limited, so it is difficult to understand why the proper moral interpretation does not require shaking off their limitations, too. Yet in the very next paragraph Richards tell us that "courts must observe the guidelines clearly established by the constitutional texts,"<sup>48</sup> and uses the state action requirement, "however unjustifiable," to exemplify "a significant barrier to the otherwise natural idea that constitutional provisions can be used to attack all forms of political immorality."<sup>49</sup> The result is confusion. On the one hand, we are urged to coax the ideal out of the real; on the other, we are told that the real is to be our guide.

The problem is this: the crucial distinction here is that between the ideal constitution which rational contractors would adopt and that which not so ideal founding fathers and subsequent amenders actually did adopt. Yet this is precisely the distinction between critical moral principles and the conventional morality underlying positive law which methodological natural law theory is concerned to deny.<sup>50</sup> To the extent that Richards acknowledges that the Constitution will not plausibly yield some of the protections required by the principles of justice without open amendment, his methodology ceases to be a useful tool for constitutional adjudication.

A possible way to avoid this result for Richards' methodology lies in an analysis of the relative institutional responsibilities which are appropriately to be accorded to various branches of government

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<sup>46</sup> *Id.* 53.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* 53-54.

<sup>50</sup> *See id.* 33.

on contractarian principles. If the moral theory were brought to bear to indicate more clearly when the judiciary should exercise a creative role and when it should defer to the amendment process, it might be possible to retain the methodology as an approach to legal reform generally. Thus, when the constitutional text will not yield contractarian results through the proper exercise of the judicial function, then resort would be had to amendment. Unfortunately, Richards' only comments analyzing institutional responsibilities concern the relative roles of the judiciary and the legislature. He tells us first that the judiciary is particularly competent to assess the proper application of his first principle and the legislature to apply the second.<sup>51</sup> This is of no help, however, in arriving at the proper limits of the judicial application of the first principle. He also tells us that "[t]he point of view of contractarian theory in this context is realistic and pragmatic: the competences of courts and legislatures are to be adjusted so that on balance the requirements of justice may most effectively be realized over time."<sup>52</sup> But even if we are warranted in extending this to the choice between judicial alteration and amendment, the comment is unilluminating; precisely what is being sought is a principled way of striking the proper balance.

In all fairness, Richards does not claim to be doing more than developing a theory of constitutional adjudication; indeed, his claims even in this regard are modest. "[T]he discussions in this work are exploratory in nature. . . . [W]hile they contain glimmers of some final truth in these matters, these views do not yet articulate that truth in a finished or final way. The comprehensive theory of moral values in constitutional law has yet to be written."<sup>53</sup> Furthermore, it is always easier to criticize than to do constructive philosophical work. That this book needs to be supplemented does not detract from its status as one of the most interesting and original pieces of constitutional theory written in the last decade.

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<sup>51</sup> *Id.* 54-55.

<sup>52</sup> *Id.* 56.

<sup>53</sup> *Id.* vii.